Supreme Court, U. S.
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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-260

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Petitioner

—*v.*—

STATE OF IDAHO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FILED: AUGUST 16, 1979
PETITION GRANTED: OCTOBER 15, 1979

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* The opinions of the court of appeals, the district court, and the Interior Board of Land Appeals, the amended summary judgment of the district court, and the judgment of the court of appeals are reproduced as appendices to the petition for certiorari and are not printed here.

STATE OF IDAHO ex rel CECIL D. ANDRUS, Governor; R. KEITH HIGGINSON, Director, IDAHO DEPARTMENT OF WATER RESOURCES; and the IDAHO WATER RESOURCE BOARD, PLAINTIFFS

vs.

U.S. SECRETARY OF THE INTERIOR, ROGERS C. B. MORTON, DEFENDANT

RELEVANT DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

DATE	PROCEEDINGS
1975	
Feb 21	Filed complaint
Jun 19	Answer of Def.
Aug 22	Motion of Ptffs. for Summary Judgment
Sep 17	Motion of Idaho Carey Act Dev. Assn. for leave to appear as amicus curiae
Sep 24	Order Granting leave to Idaho Carey Act Development Assoc. to appear as Amicus Curiae (JBA) cc: Nathan W. Higer; U.S. Atty.; Terry L. Crapo
Feb 26	Cross-Mo by deft. for S.J.
Apr 30	Record of hearing; Summary Judgment Motions taken under advisement (JBA)
Jul 15	Memo. Decision and Order re Motions for Summary Judgment (JBA) w/ attached CCM
Jul 27	LODGED proposed Summary Judgment of Ptffs.
Aug 6	Mo. of Def. for Clarification and Reconsideration
Aug 26	Record of hearing; Def's Mo. for Clarification and Reconsideration Denied; Mr. Higer to submit formal Order (JBA)

DATE	PROCEEDINGS
1975	
Aug 27	Summary Judgment—partially in favor of Ptffs.; partially in favor of Def. and w/o Costs (JBA) Bk. 16, Pg. 25 w/ CCM
Sept. 1	Motion for amendment of summary judgment; order by plaintiffs
Sept. 7	Order amending summary judgment (JBA) w/ attached clerk's certificate of mailing (Book 16, p. 29)
Oct 22	Notice of Appeal by Def. USA w/ CCM
Nov 1	Motion for Amendment of S.J. by Ptff.
Nov 5	Notice of Cross-Appeal by Ptffs.
Nov. 15	Order granting motion to amend summary judgment (JBA)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

1977	
Feb 2	DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL gr'h
Feb 28	FILED CERT TRANS OF RECORD ON APPEAL IN THREE VOLUMES. VOL. I, PLDGS, THREE CERT COPIES. VOL. II-III, R/T's, ORIG & ONE COPY.
Mar 28	Filed motion of Idaho Carey Act Development Assoc. for leave to appear as amicus curiae. (Schickele) ec
Apr 8	Filed order (K1) Upon due consideration, the Idaho Carey Act Development Association is granted leave to file an amicus curiae brief and its request to participate in oral argument is referred to the panel which hears the appeal on its merits. cf
Mar 12	As of 3/6/79, ARGUED & SUBMITTED Before: ELY, KILKENNY, CJJ, FERGUSON, DJ -vt-

DATE	PROCEEDINGS
1979	
Apr 23	As of Apr 19, ORDERED OPINION FILED (PER CURIAM) & JUDG TO BE FILED & ENTD.
Apr 23	As of Apr 19, Filed Opinion—AFFIRMED.
Apr 23	As of Apr 19, Filed & Entd Judgment. -dmf-
11 Jul 1979	MANDATE ISSUED

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ATTORNEYS FOR PLAINTIFFS

[Filed Feb. 21, 1975]

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

Civil No. 1-75-22

STATE OF IDAHO ex rel CECIL D. ANDRUS, Governor; R. KEITH HIGGINSON, Director, IDAHO DEPARTMENT OF WATER RESOURCES; and the IDAHO WATER RESOURCE BOARD, PLAINTIFFS

vs.

U.S. SECRETARY OF THE INTERIOR,
ROGERS C. B. MORTON, DEFENDANT

COMPLAINT

COMES NOW the Plaintiffs and by way of Complaint against the Defendant, complain, state and allege as follows:

FIRST CAUSE OF ACTION

I

Plaintiff, Cecil D. Andrus is the duly elected Governor of the State of Idaho. Plaintiff, R. Keith Higginson, is the Director of the Department of Water Resources, State of Idaho, and in such capacity is responsible for the administration of any and all applications and proceedings under what is commonly called the Carey Act

(43 USC 641). Plaintiff, Idaho Water Resource Board, is an applicant for segregation of certain lands for construction of a project for reclamation and irrigation of dessert lands in Idaho under the Carey Act. The Defendant, by and through his agent, the Director of the Bureau of Land Management, Boise, Idaho, has control and supervision of certain federal lands within the State of Idaho that are desert in character.

II

Jurisdiction of this matter lies with this Court by virtue of a federal question existing and amounts of money involved have a value in excess of $10,000, exclusive of costs and interest. In addition, this Court has jurisdiction pursuant to the Federal A.P.A. (5 USC 701 et seq).

III

The Defendant's agent (hereinafter Bureau of Land Management) has notified Plaintiff, R. Keith Higginson, that he will not allow the requests for segregation or withdrawal under the Carey Act as a matter of right. The Defendant specifically alleges that he has the authority to determine what lands are suitable for disposal under the Carey Act, even though the lands refused to be granted are in fact desert and suitable for agricultural use and settlement. By virtue of various acts of Congress, the United States has bound itself to donate, grant and patent to the State of Idaho, free of cost for survey or price, three million acres of desert lands if the State causes the same to be irrigated, reclaimed and occupied. By virtue of decisions already received from the Bureau of Land Management, the Plaintiff believes that the Defendant intends to and has violated the contract established by said Carey Act to convey these lands upon request of the State. The Plaintiff believes that these lands are subject to temporary withdrawal and/or segregation upon Plaintiff's request and the Defendant is without any discretion to deny desert lands once requested.

Wherefore, the Plaintiffs, Cecil D. Andrus and R. Keith Higginson, demand judgment of this Court declaring that the State of Idaho has an absolute right to demand up to three million acres of desert lands under the Carey Act and further declaring that the Defendant, through his agent, Bureau of Land Management, has no authority or discretion to deny any request for segregation or withdrawal when presented by the Plaintiff.

SECOND CAUSE OF ACTION

COMES NOW the Plaintiffs, and by way of a second cause of action against the Defendant, state, allege and complain as follows:

I

Plaintiffs reallege in toto the allegations of Paragraphs I and II of the first cause of action.

II

The Defendant, by and through his agent, the Director of the Boise, Idaho Office of the Bureau of Land Management (hereinafter Bureau of Land Management) has notified the Plaintiffs and each of them, that they will follow the directions given to the Bureau of Land Management by a Solicitor's Opinion, dated August 29, 1974 (copy attached hereto and made a part hereof by reference thereto). Said opinion refers in part to certain amendments made to the Idaho Carey Act (*Idaho Code*, § 42-2013, amended by Chapter 164, 1972 Session Laws, page 1400) which provides:

> "For the purpose of any drawing and/or selection of land for entry under this section or section 42-2013a, Idaho Code, a husband and wife shall be allowed to join their entries and receive a total of three hundred twenty (320) acres in one drawing or selection . . ."

The Solicitor's Opinion and the Bureau of Land Management, intend to and have declared that it would be unlawful and in violation of the Federal Carey Act for the State of Idaho to proceed in the manner authorized by

said State Law, even though a Solicitor's Opinion, dated March 7, 1968, states it would be proper. The Bureau of Land Management holds that a husband and wife are not two separate persons, as provided in the Federal Act and are therefore not entitled to 320 acres of land for settlement and reclamation and threatens legal action if the Plaintiff, R. Keith Higginson, proceeds pursuant to the above State Law. The Plaintiff has received requests for segregation under the Carey Act which are intended to be settled by a husband and wife on 320 acres.

III

The Plaintiff, R. Keith Higginson, as Administrator of the State Carey Act, must have clarification of the legal rights of the State of Idaho so that he can properly and without fear of legal action, proceed to patent lands under the Carey Act as provided by State Law. If the interpretation given by the Solicitor and the Bureau of Land Management is correct, and the Plaintiff, R. Keith Higginson, proceeds under State Law as he is obligated to do, he will expend amounts of money in excess of $10,000 unnecessarily and will place hundreds of applicants in untenable positions whereby they assume and believe 320 acres are available to a husband and wife and expend money accordingly and later find that only 160 acres are available. Although 320 acres makes an economically feasible project, 160 acres does not and these applicants would be forced to abandon their entries. The Plaintiff, R. Keith Higginson, needs clarification of the State's rights and duties so that he can properly proceed.

IV

The Plaintiff, Idaho Water Resource Board, is an applicant under the Carey Act for development of what is commonly called Indian Hills. The above-referred to opinion holds that these lands are desert in character and subject to Carey Act entry, but for only 160 acres for a husband and wife. The Plaintiff's, Idaho Water Resource Board, project for said lands calls for entries of

320 acres for a husband and wife and is not economically feasible with 160 acre entries. The Plaintiff, Idaho Water Resource Board, will expend in excess of two million dollars in developing said project on the basis of 320 acre entries and would lose that money if the State of Idaho was prohibited from patenting 320 acres to a husband and wife. Before the Plaintiff proceeds, it needs clarification of its and the State's rights under the Carey Act. Plaintiff, Idaho Water Resource Board, has already requested segregation of the Indian Hills lands.

Wherefore, on Count II, the Plaintiffs and each of them, demand judgment of this Court declaring their rights under the Federal Carey Act and specifically declaring that the State of Idaho can patent 160 acres each to a husband and wife and that a joint granting of a 320 acre tract is valid and further declaring that the State as long as each person receives no more than 160 acres, can proceed in accordance with *Idaho Code*, § 42-2013 as amended and still be in compliance with the Federal Carey Act and further declaring that the opinion as written and if applied, would be a denial of equal protection of the laws to women.

THIRD CAUSE OF ACTION

COMES NOW the Plaintiffs and for a Third Cause of Action against the Defendant, complain, state and allege as follows:

I

Plaintiffs reallege in toto the allegations of Paragraphs I and II of the Second Cause of Action.

II

By virtue of the Solicitor's Opinion, the Bureau of Land Management intends to and will require the establishment of two separate distinction homes on each 160 acres by husband and wife entry persons. The Solicitor's Opinion and the Bureau of Land Management claim that one house built upon the line between the two quarter sections will not establish a valid residence under the Carey Act for both entries.

III

Plaintiff, R. Keith Higginson, is charged with examining each entry upon proof of reclamation and settlement being given, and if satisfied that the law has been complied with, he must cause patent to issue from the Federal Government to the State and then to the entryman. In order that the Plaintiff, R. Keith Higginson, may carry out his duties under the State and Federal Carey Acts, in a lawful manner, it is incumbent for him to know if he can issue patents to a husband and wife who have built only one house on the dividing line between their entries and whether one house so built will suffice as a residence for both entries.

IV

The Plaintiff, Idaho Water Resource Board, as an applicant for construction of a project must know whether or not one house built by a husband and wife on the line between two entries will suffice as residence for both entries. The feasibility of their project depends on the need for only one house and 320 acres. They will expend in excess of two million dollars if the project goes forward and must know, in order to avoid such a large loss, if the residence requirements can be met as outlined above.

WHEREFORE, the Plaintiffs and each of them, demand judgment of this Court declaring that the State of Idaho can issue patent for joint husband and wife entries where residence for both is established by building only one home on the dividing line between the two 160 acre entries.

DATED this 19th day of February, 1975.

WAYNE L. KIDWELL
Attorney General
State of Idaho

by /s/ Nathan W. Higer
NATHAN W. HIGER
Assistant Attorney General

[DoI Emblem]

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF THE SOLICITOR

Washington, D.C. 20240

In Reply Refer to: Aug. 29, 1974

Memorandum

To: Director, Bureau of Land Management

From: Solicitor

Subject: Interpretation of Carey Act with regard to Idaho proposal for reclamation of former Indian Hill Desert Land Entries

This opinion is in reply to your memorandum of June 7, 1974, in which you presented to us two issues for consideration:

(1) Does the Act of August 18, 1894, as amended, known as the Carey Act (43 U.S.C. §§ 641 et seq.), allow a State to patent two 160-acre parcels to a husband and wife when their actual residence is on only one of the parcels?

(2) Can the lands be considered desert in character and subject to Carey Act segregation as soon as Hoodco removes the pumping facilities which now convey water to the irrigation system on the lands?

Introduction

The State of Idaho is planning to submit proposals for Carey Act projects which would include the 2,860 acres of the so-called Indian Hill lands. At this time, the BLM Idaho State Director has temporarily withdrawn these lands from settlement or entry under the 1910 amendment to the Carey Act (43 U.S.C. § 643). Also, a proposed classification which would open the lands to Carey Act selection has been published in the Federal Register. (39 Fed. Reg. 9845, March 14, 1974.) Idaho intends to apply for segregation of the lands and to contract for installation and improvement of irrigation facilities if it is our legal opinion that the lands are subject to Carey Act application.

The Indian Hill lands were entered by various individuals under the Desert Land Act (43 U.S.C. §§ 321 et seq.) about 1963, and several patents were issued under that Act. These patents and all entries on the lands were cancelled on the basis that the entries and patents were fraudulently procured because individuals assigned their entry rights to the corporation that installed the irrigation system on the lands and never intended to individually reclaim, settle and cultivate the lands. This Departmental action was recently upheld by the courts in *Reed* v. *Morton*, 480 F.2d 634 (9th Cir. 1973), *cert. denied*, 414 U.S. 1064 (1973).

I. *Can husband and wife each receive a 160-acre parcel under the Carey Act?*

A recent amendment to Idaho law would permit a husband and wife to receive 160 acres each from the State under the Carey Act.* It is our opinion that the Carey Act does not allow this.

The Carey Act authorizes the Secretary of the Interior to contract with certain States to patent to them such desert lands as the States may cause to be irrigated, reclaimed, occupied and cultivated by "actual settlers." Individual settlers receive their patents from the State. Section I of the Act contains a proviso which states that "said States shall not sell or dispose of more than one hundred and sixty acres of said lands *to any one person.* . . ." (43 U.S.C. § 641.) Idaho representatives consider

* Idaho Code § 42-2013 was amended on April 1, 1974, to provide that "a husband and wife shall be allowed to join their entries and receive a total of three hundred twenty (320) acres [under the Carey Act]."

that a husband and wife are two "persons" within the meaning of the Act. This thinking is at odds with legislative purpose and Department precedent.

It is clear from the overall context of the statute that the term "person" in the proviso means "actual settler." The sentence immediately preceeding the proviso quoted above states that patents are to issue to a State as fast as it can prove "that any of said lands are irrigated, reclaimed and occupied by actual settlers. . . ." The initial sentence of the Act declares its purpose to be "to aid the public-land States in the reclamation of the desert lands therein, and the *settlement*, cultivation and sale thereof in small tracts to *actual settlers*." (Emphasis added.)

The record of Congressional consideration of the Carey Act bill confirms that Congress intended that the 160-acre limitation should apply not to each "person" but rather to actual settlers or entire households.

During debate on the floor of Congress concerning the practicality of the original Carey Act bill in 1894, there were numerous references by the Representatives to the 160-acre allotment of the bill. The Act is spoken of variously as providing 160 acres for "citizens who will establish homes," for "the home-seeking and home-deserving people," for the man who would establish "for himself *and family* a home" (emphasis added), and for "bona fide homes." 26 Cong. Rec. 8419-36 (1894). See also, S. Rep. 332, 53d Cong., 2d Sess. These expressions clearly indicate that members of Congress were considering the bill in terms of 160 acres being sufficient to provide a living for each family unit.

Most important in construing the legislative intent is the fact that before the Carey Act was considered and passed by Congress in 1894 the term "actual settler" had acquired a well-defined meaning in public land law. *United States* v. *Atterbery*, 10 L.D. 36 (1890). The term meant an "actual resident" or "one who has gone upon and occupied land with a bona fide intention of making it his home, and does some act in execution of such intention." *Id.; Rene* v. *Prendergast*, 17 L.D. 385 (1893). See also *Samuel M. Frank*, 2 L.D. 628 (1884). The *Atterbery* decision added to the general definition the note that one cannot be considered an actual settler who makes settlement through collusion with, and for the benefit of, another.

Subsequently, in *State of Oregon*, 36 L.D. 509 (1908), the Department held that the term "person" in the acreage-limitation proviso of the Carey Act means "actual settler." *

Under the law as it applies to "actual settlers" it is not possible for both a husband and wife who are not separated to qualify for 160 acres as actual settlers, since it is presumed that they will share the same residence and this mutual residence can be located upon only one 160-acre tract.**

Since it is our conclusion that the Idaho law would contravene the Carey Act in almost all cases, the question

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* The Department's interpretations of similar acreage-limitation provisions using the term "person" in other Acts have not always been consistent. The Homestead Act of 1862 (12 Stat. 392, now codified in scattered sections beginning at 43 U.S.C. § 161) was construed not to allow a married woman to make entry unless she was "a head of a family," which the Act provided for, or she qualified under one of the express provisions pertaining to married women (e.g., 43 U.S.C. § 167). See 43 CFR § 2511.1(b)(1) (1973). The Department also interpreted the Timber and Stone Act of 1978 (20 Stat. 89, 43 U.S.C. §§ 311-13; now repealed) to preclude a husband and wife from each claiming 160 acres where it would result in one person or one head of a family controlling both entries. See *Secretarial Letter*, 2 L.D. 332 (1882); *Dept. Circ.*, 51 L.D. 365 (1926); 43 CFR § 285.6 (1940). In the case of the Desert Land Act, however, the Department has allowed wives to make entries without regard to any entries made by their husbands. See 43 CFR 2521.1(a)(1) (1973). The opinions which established this position did not give the reasoning underlying their conclusion. See *Delila Stukel*, 10 L.D. 47 (1890), and authorities referred to therein, and *Selway* v. *Flynn*, 6 L.D. 541 (1888).

** We recognize that it is possible for cases to arise in which both husband and wife could qualify for 160 acres because they are separated and make bona fide settlement free from any collusion with their spouse.

may arise as to whether the Department could approve segregation of the land or grant patents to the State while the statute is still in force. Strictly as a matter of law, the Department can go so far as to issue patents to the State, but subsequently it would have to take legal action if the State attempted to issue patents under the husband-and-wife amendment to persons who were not actual settlers. In *State of Washington*, 26 L.D. 74 (1898), the Department dealt with the problem of conflicting language in the Carey Act concerning the conditions which must be fulfilled before patents can issue to a State. (43 U.S.C. §§ 641, 642.) It was held that settlement is not a condition precedent to the granting of patents to a State. In *State of Oregon*, 36 L.D. 509 (1908), the Department took the position that if a State attempted to patent lands to persons who were not "actual settlers", it would subject the grant to the State, at least those parts which the State attempted to alienate illegally, to forfeiture for condition broken.

II. *Can the lands be considered to be subject to disposition under the Carey Act?*

The Indian Hill lands are situated next to a 400-foot bluff on the south side of the Snake River. The bluff is nonirrigable public land and was not included in the desert land entries. Irrigation water is conveyed from the river to the farmland by a pumping station at the river's edge. The pumping facilities consist of two 24-inch steel penstocks and a number of large natural gas-powered pumps. A pipeline runs from the pumping site to a 200-foot ditch which empties into a holding pond on top of the bluff. The pumping site and pipeline are located on a right-of-way licensed to Indian Hill Irrigation Co.* From the reservoir two large ditches extend

* Indian Hill controls the right-of-way and pumping facilities on paper, but Hoodco has actual control as a mortgagee in possession protecting its interests, because it financed the irrigation system taking a pledge of Indian Hill stock as collateral. No action has been taken by the Government to cancel the right-of-way because it is being used to service private Hoodco lands.

west and south to provide water for sprinkler lines. The south ditch runs across the Indian Hill lands and onto a 640-acre tract privately-owned by Hoodco; it carries irrigation water for both the Indian Hill and Hoodco lands.

Although the Circuit Court's decision in *Reed* v. *Morton*, *supra*, confirmed government title to the Indian Hill lands, much of the property is still being occupied and farmed by a tenant of Hoodco under a stipulation entered into to protect and conserve the lands pending entry of final judgment. Under the stipulation, a wheat crop is being farmed with water for irrigation being provided by Hoodco. Hoodco is to provide water until maturity of the crop, and the tenant farmer is to vacate the land by September 15, 1974. When the crop is harvested, a stubble of at least three inches must be left to prevent erosion.

Your memorandum requesting this legal opinion states that Hoodco proposes to remove the pumping facilities around the end of the summer.* At a meeting on July 11, 1974, members of Idaho's Department of Water Resources, the State entity which would control Carey Act development, represented to the Department of the Interior that if the State obtains control of the Indian Hill lands under the Carey Act, it would not attempt to salvage any of the Hoodco pumping facilities because they are inadequate and worn-out; it would apply for a right-of-way near the present pumping site and contract for installation of a new pumping station employing electric power.

Assuming that Hoodco is definitely going to remove the present pumping facilities, and they will have to be re-

* We have been informed that if the Department approves an Idaho Carey Act application, the State will seek the cooperation of the Department in arranging with Hoodco to leave the pumping facilities in place to provide for a farming arrangement similar to that in the stipulation for the summer of 1975 in order to continue conservation of the topsoil while Carey Act development is beginning. Assuming this plan is carried out, it does not change our opinion.

placed by the State, it is our opinion that the Indian Hill lands can be considered as subject to Carey Act disposition.

The fact that wheat stubble will linger for some time without irrigation has no bearing on the issue. The Carey Act provides for reclamation through State action of "desert lands" as defined under the Desert Land Act.* This definition (43 U.S.C. § 322) states:

> All lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands. . . . The determination of what may be considered desert land shall be subject to the decision and regulation of the Secretary of the Interior or such officer as he may designate.

Since it is assumed that the stubble will certainly die and that crops will not survive without irrigation, the land, even while it is being farmed, should be considered "desert land." **

The stubble is like any growth that will remain after cultivation of desert land in a year of abnormal rainfall, and the remnants of such cultivation do not change the desert character of the land.*** The Desert Land Act regulations expressly provide that lands are desert in character even though they can support crops "in alternate years by means of the so-called dry-farming system. (37 L.D. 522 and 42 L.D. 524)." 43 CFR § 2520.0-8 (a) (1).*

* The term "desert land" is a legal term which was intended to encompass what most people consider "arid lands." See the record of Congressional debate on the Carey Act, 26 Cong. Rec. 8419-36 (1894), and 43 CFR § 2520.0-1.

** This is especially true since in this case the land has already once been determined to be desert land—when Desert Land Act applications were accepted from the entrymen in *Reed* v. *Morton, supra.*

*** For a recent case holding that the raising of a crop without irrigation during a year of abnormal rainfall is not evidence of reclamation, see *United States* v. *Elsie Marie Knowlton and Morris J. Knowlton,* A-30912 (1968).

The real issue is whether the Indian Hill lands must be considered to be "effectually reclaimed" and therefore not subject to disposition under the Carey Act.

The Department's regulations concerning lands subject to disposition under the Desert Land Act state that "land that has been effectually reclaimed is not subject to desert land entry." 43 CFR § 2520.0-8(a) (2). This regulation must be construed to apply to desert land being considered for Carey Act disposition.**

The term "effectually reclaimed" is not defined in the regulations. The term "reclamation" is defined as requiring "conducting water in adequate amounts and quality to the land so as to render it available for distribution when needed for irrigation and cultivation." 43 CFR 2520.0-5(a) (1). The regulations give no hint as to the intended meaning of "effectually", however. Relying simply on dictionary definitions of "effectually", one is led to conclude that effectual reclamation is reclamation which produces a result which is substantially in accordance with the definition but is somehow technically deficient.

A more thorough analysis of the regulation and its application to the situation at hand requires perception of the Congressional intent which it is designed to fulfill and the rationale of the case decisions in which the term has been used.

* The decisions cited in the regulation, *Pederson* v. *Parkinson* (1909) and *Houston* v. *Spaulding* (1913), respectively, describe "dry farming" as farming without artificial irrigation in years of abnormal rainfall or alternate years using special measures to conserve the moisture in the soil.

** The Carey Act regulations (43 CFR § 222.6 (1970)), under the heading of "Character of land subject to selection", state that character is to be determined under the Desert Land Act definition of desert lands and Departmental regulations and decisions. The cited Desert Land Act regulation occurs under the heading of "Land subject to disposition."

The Congressional debate on the Carey Act shows that the general plan was to provide a means whereby a State could shoulder the burden of developing land for reclamation homesteads where reclamation would require such substantial work and expenditure of money that it could not be handled by individual settlers. 26 Cong. Rec. 8419-36 (1894). The substantial reclamation work which is the responsibility of the State is the legal consideration for the contract under which it is to receive title to desert lands. "[R]eclamation is the only consideration for the donation or grant and is a condition precedent to the exercise of the power to grant." *Twin Falls Salmon River Land & Water Co.* v. *Alexander*, 260 F. 270, 272 (D. Idaho 1919), aff'd, 267 F. 382. Desert land is patented to a State under contractual terms which require reclamation work as consideration; and if, before the State applies for segregation of the lands (the contract is entered into when the application is approved), reclamation work has already been carried out to such an extent that there is nothing substantial left to do, there would not be adequate consideration for the contract.

Department decisions on effectual reclamation can be construed as consistent with this interpretation of the regulation from the viewpoint of the general purpose of the Act.*

The term "effectually reclaimed" was introduced into the regulations in 1965 following several Desert Land Act decisions which used the phrase for the first time.**

Earlier decisions spoke only of desert land which had already been "reclaimed", and they do not present sufficient facts to provide any guidance here.***

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* There are no Federal court cases in point.

** There are no decisions in point under the Carey Act.

*** See *Taylor* v. *Rogers*, 14 L.D. 194 (1892); *Campbell* v. *Sutter*, 16 L.D. 40 (1893); *Len Everett*, A-27050 (1955). There are also many Departmental decisions dealing with the question of what constitutes sufficient reclamation for purposes of final proof under the Desert Land Act. These decisions are not in point because, as will be seen below, the term "effectual reclamation" was brought into the law apparently in order to differentiate from "reclamation" in the broad sense it is used in the Desert Land Act as indicating satisfaction of the requirements of final proof. Effectual reclamation does not require reclamation to the extent required for final proof.

The term was first used in *George W. Wilkinson*, A-29315 (1963). In the *Wilkinson* decision, the Department affirmed rejection of a desert land entry because the record showed that the applicant had cultivated and irrigated all irrigable portions of the land for a number of years before he filed his application. At the time of application, Government inspection showed that irrigation ditches upon the land were provided with water by a ditch, running out of a creek, which was large enough to properly irrigate all the land, and that Wilkinson was actually cutting a hay crop on the land. The decision relied on the rule that "if all has been accomplished upon the land that would be required for final proof of a desert land entry, the land has been *effectually reclaimed.*" (Emphasis added.) In this case the reclamation improvements were of a reasonably permanent nature.

In *Mary Helen Conlan*, A-29398 (1963), the Department affirmed rejection of a Desert Land Act application on the basis that the applicant had already reclaimed the land and therefore it was no longer subject to entry. On appeal the only issue raised was whether or not the land was reclaimed. Two parcels of land were in issue. The evidence showed that the applicant had drilled a well on land adjoining the two parcels, and water from the well was conducted in ditches across one of these parcels and onto the other parcel. Nearly sixteen acres of oats were cultivated on the latter parcel. In her appeal, the applicant stated that there was no pump on the well at that time and the land in both parcels had returned to its desert state. It was held that at the time of application both parcels had been effectually reclaimed so as not to be subject to entry as desert land. The decision concluded that the applicant possessed "the *present means* to bring the land under cultivation" and "the fact that

these means are *presently idle* does not return the land to its desert character." (Emphasis added.) It is important to note that in this case the condition of the well was a matter within the control of the applicant, since she had recently used it to provide irrigation water.

In reaching the conclusion that the lands were effectually reclaimed, the *Conlan* decision also stated the following important dictum: "[T]his is not to say that desert land, having once been reclaimed, cannot revert to a desert land status."

The most recent case in point, *Dorothy A. Strait*, A-30436 (1965), makes clear the usefulness of the distinction between effectual reclamation and reclamation.* The applied-for land had been cultivated in trespass, both before and after the time of application, by the applicant's brother, who had developed a well on his adjoining private land and was using it to irrigate and cultivate the land. Thus, the applicant had no legal control over the water supply, and she contended that the land was not effectually reclaimed because there was no permanent water supply for irrigation. The Department concluded otherwise, stating:

> It would thus appear that a permanent water supply has been developed for this land. The fact that it might not be specifically available to the appellant, which is not completely apparent, does not take away from its being generally a permanent source of water for the land, viewing the situation from the perspective of the one who has reclaimed the land. It would thus appear that the land involved has been effectually reclaimed.

The *Strait* decision is somewhat confusing in its explanation of the permanency of the water supply, but the result makes sense considering the brother-sister relationship and the fact that the brother had continued cultivating the land after his sister applied for it and was continuing to cultivate it at the time of appeal, so that one could properly conclude that the sister was acting as a strawman for her brother and the brother would be the one who would continue cultivation of the land and receive the benefit of a patent. In other words, there was compelling evidence that the land was effectually reclaimed because the applicant would not have to contribute substantially to reclamation.

* Between the *Conlan* and *Strait* decisions there was one other case turning on effectual reclamation which is not discussed because it does not set out the details concerning the reclamation accomplished at the time of application. *David E. Iveson*, A-30058 (1964).

The requirement of permanency of reclamation which is stressed in the *Strait* decision is crucial to our opinion that the Indian Hill lands can be considered as subject to Carey Act disposition.* The lands cannot be considered effectually reclaimed if it is certain that the existing pumping facilities—which are the means to convey irrigation water to the land and are thus an essential part of reclamation as defined in the regulations—will no longer be available for the land and that it will be necessary for the State to undertake substantial reclamation work at least in the form of replacing those facilities.

In summary, effectual reclamation is a matter of degree to be determined keeping in mind the principles of adequate consideration, in the form of necessary reclamation work, for the patent and reasonable promise of permanency in changing the *status* of the land from desert tc agricultural.

* Reclamation must be "by such means as will give reasonable promise of permanence." *ex parte Emma J. Warren*, 8 L.D. 113 (1889). See also Commissioner's Instructions, 4 L.D. 51 (1885); *Wallace* v. *Royce*, 1 L.D. 26 (1882); and references to permanency of required reclamation facilities in the regulations; 43 CFR § 2521.6(f). The requirement of reasonable promise of permanency must be read into the regulation on effectual reclamation. The regulation speaks of land which "*has been* effectually reclaimed," but, as was noted in the *Conlan* decision, *supra*, "this is not to say that desert land, having once been reclaimed, cannot revert to a desert land status."

Assuming that Hoodco will definitely remove the present pumping facilities and that it will be necessary for Idaho to replace them in order to provide irrigation water, we conclude that the Indian Hill lands should not be considered "effectually reclaimed" and therefore should be subject to disposition under the Carey Act.

David E. [Illegible]

Deputy Solicitor

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-75-22

[Filed Jun. 19, 1975]

STATE OF IDAHO ex rel CECIL D. ANDRUS, Governor; R. KEITH HIGGINSON, Director, IDAHO DEPARTMENT OF WATER RESOURCES; and the IDAHO WATER RESOURCE BOARD, PLAINTIFFS

—*vs*—

U.S. SECRETARY OF THE INTERIOR,
ROGERS C. B. MORTON, DEFENDANT

ANSWER

COMES NOW the defendant, Rogers C. B. Morton, Secretary of the Interior of the United States, by and through the United States Attorney for the District of Idaho, and as and for his answer to the complaint herein, admits, denies, and avers as follows:

FIRST CAUSE OF ACTION

I

Answering paragraph I, admits so much thereof as alleges that the plaintiff, Cecil D. Andrus, is a duly elected Governor of the State of Idaho and that the plaintiff, R. Keith Higginson, is the Director of the Department of Water Resources, State of Idaho, having responsibility for applications and proceedings by the State pursuant

to 43 USC 641, et seq. Defendant denies that the plaintiff Idaho Water Resource Board is an applicant for segregation of lands for construction of a project for reclamation and irrigation of desert lands in Idaho under the Carey Act, but admits that the defendant through his agency, has control and supervision of certain federal lands within the State of Idaho that are desert in character.

II

Answering paragraph II, admits so much thereof as alleges the jurisdiction of this Court by reason of issues of federal law, but denies each and every remaining allegation of said paragraph II.

III

Answering paragraph III, admits so much thereof as alleges that the Bureau of Land Management has notified the plaintiff R. Keith Higginson that it will not allow requests for segregation or withdrawal under the Carey Act as a matter of right, save and except that the defendant denies that any request for segregation or withdrawal under the Carey Act or any application for grant contract has been submitted to the defendant, and alleges affirmatively that the only applications filed by the plaintiffs with respect to the lands alleged to be involved in this case are applications for temporary withdrawal of said lands for possible proposed reclamation projects. The defendant specifically denies each and every remaining allegation in the said paragraph III of plaintiffs' first cause of action.

SECOND CAUSE OF ACTION

I

Answering paragraph I of the second cause of action, admits so much of the aliegation as therein incorporated by reference as has heretofore been admitted in the answer to paragraphs I and II of the first cause of action, but specifically denies each and every remaining allega-

tion of said paragraphs I and II of the first cause of action incorporated by reference into paragraph I of the second cause of action.

II

Answering paragraph II of the second cause of action, admit so much thereof as alleges that the defendant, by and through the Bureau of Land Management, has notified the plaintiffs that the defendant and the Bureau of Land Management will follow directions given to the Bureau of Land Management by a Solicitor's Opinion, dated August 29, 1974, and denies each and every remaining allegation of the said paragraph II of the second cause of action.

III

Answering paragraph III of the second cause of action, alleges and avers that the defendant is without knowledge or information to form a belief as to the truth of the allegations contained in said paragraph III, and accordingly denies the same.

IV

Answering paragraph IV of the second cause of action, admits so much thereof as avers that the plaintiff has filed an application, but denies that the application is for "segregation" of the lands known as Indian Hills, and alleges affirmatively that the plaintiff has applied only for temporary withdrawal of the subject lands, and further alleges that the defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph IV, and accordingly denies the same.

THIRD CAUSE OF ACTION

I

Answering paragraph I of the third cause of action, incorporated by reference paragraphs I and II of the second cause of action, the defendant admits so much thereof as was heretofore admitted in his answer to paragraphs I and II of the said second cause of action, and

expressly and specifically denies each and every remaining allegation not so admitted in the answers to paragraphs I and II of said second cause of action.

II

Answering paragraph II of plaintiffs' third cause of action, admits so much thereof as alleges that the Solicitor's Opinion and the Bureau of Land Management take the position that one house built upon a boundary line between two quarter sections will not establish a valid residence under the Carey Act for both entries, and denies each and every remaining allegation in said paragraph II of the third cause of action.

III

Answering paragraph III of the third cause of action, alleges that the defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and accordingly denies the same.

IV

Answering paragraph IV of the plaintiffs' third cause of action, alleges that the defendant is without knowledge or information sufficient to form a belief as to the truth of the ailegations contained therein, and accordingly denies the same.

AFFIRMATIVE DEFENSE

As and for his further defense to the complaint on file herein, the defendant alleges affirmatively that the first cause of action, the second cause of action and third cause of action alleged in said complaint, and each of said causes of action, so denominated, fail to state a claim or claims upon which relief can be granted.

WHEREFORE, the defendant, having fully answered the plaintiffs' complaint on file herein, prays that the

complaint and action herein be dismissed, and that the defendant recover his costs of action herein.

Dated this 18th day of June, 1975.

/s/ Wilbur T. Nelson
WILBUR T. NELSON
United States Attorney

I hereby certify that a copy of the foregoing Answer was mailed to Nathan W. Higer, Special Assistant Attorney General, Department of Water Resources, State Capitol, Boise, Idaho 83720, plaintiffs' attorney, this 19th day of June, 1975.

/s/ Wilbur T. Nelson
WILBUR T. NELSON

WAYNE L. KIDWELL
Attorney General
State of Idaho
by NATHAN W. HIGER
Special Assistant Attorney General
Legal Counsel, Idaho Department
of Water Resources
State Capitol
Boise, ID 83720
TELEPHONE: 384-2215

ATTORNEYS FOR PLAINTIFFS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-75-22

[Filed Aug. 22, 1975]

STATE OF IDAHO ex rel CECIL D. ANDRUS, Governor; R. KEITH HIGGINSON, Director, IDAHO DEPARTMENT OF WATER RESOURCES; and the IDAHO WATER RESOURCE BOARD, PLAINTIFFS

—*vs.*—

U.S. SECRETARY OF THE INTERIOR,
ROGERS C. B. MORTON, DEFENDANT

MOTION FOR SUMMARY JUDGMENT

COMES NOW the Plaintiffs herein, by and through their attorney of record, Nathan W. Higer, and moves this Court for summary judgment.

This motion is based upon the fact that there are no genuine issues of fact to be decided and that as a matter of law the Plaintiffs are entitled to judgment as prayed for in the complaint.

This motion is further supported by the brief filed herewith.

DATED this 21st day of August, 1975.

/s/ Nathan W. Higer
NATHAN W. HIGER
Special Assistant Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 21st day of August, 1975, a true and correct copy of the foregoing MOTION FOR SUMMARY JUDGMENT was mailed, postage prepaid to: Wilbur T. Nelson, United States Attorney, District of Idaho, 698 Federal Building, 550 West Fort Street, Boise, ID 83724.

/s/ Nathan W. Higer
NATHAN W. HIGER

MARION J. CALLISTER
UNITED STATES ATTORNEY
DISTRICT OF IDAHO
BOX 037, FEDERAL BUILDING
550 WEST FORT STREET
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TELEPHONE NO. 342-2711, Ex. 2211

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-75-22

[Filed Feb. 26, 1976]

STATE OF IDAHO ex rel. CECIL D. ANDRUS, GOVERNOR; R. KEITH HIGGINSON, Director, IDAHO DEPARTMENT OF WATER RESOURCES; and the IDAHO WATER RESOURCE BOARD, PLAINTIFFS

—*vs.*—

THOMAS S. KLEPPE, Secretary of the Interior, DEFENDANT

DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant Secretary of the Interior, by and through the United States Attorney for the District of Idaho, and moves the Court for its order, pursuant to Rule 56(b), Federal Rules of Civil Procedure, adjudging that the Plaintiffs are not entitled to the relief requested on the basis of the allegations contained in the complaint on file herein, and adjudging that the complaint and action be dismissed;

On the grounds and for the reasons that the pleadings and record on file herein show that there is no genuine issue as a material fact and that the Defendant is entitled to judgment as a matter of law.

This motion is based on the pleadings and record on file herein, the memorandum in support of motion and in opposition to plaintiffs' motion for summary judgment

filed herewith, and on Rule 56(b), Federal Rules of Civil Procedure.

Dated this 26th day of February, 1976.

MARION J. CALLISTER
United States Attorney

By /s/ Wilbur T. Nelson
WILBUR T. NELSON
Assistant United States Attorney

I hereby certify that copies of the foregoing Defendant's Cross-Motion for Summary Judgment and copies of Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment were served on the following this —— day of February, 1976:

Nathan W. Higer
Special Assistant Attorney General
Department of Water Resources
State Capitol
Boise, Idaho 83720

Terry L. Crapo
Holden, Holden, Kidwell, Hahn & Crapo
P. O. Box 129
Idaho Falls, Iowa 83401

/s/ Wilbur T. Nelson
WILBUR T. NELSON

SUPREME COURT OF THE UNITED STATES

No. 79-260

CECIL D. ANDRUS, SECRETARY OF INTERIOR, PETITIONER

v.

IDAHO, ET AL.

ORDER ALLOWING CERTIORARI

Filed October 15, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 305570 135